SUPREME COURT, U. S. Nos. 820, 849

FILED
JAN 2 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

THRIFTY SHOPPERS SCRIP CO.,

Appellant,

v.

UNITED STATES OF AMERICA, BLUE CHIP STAMP COMPANY, ALEXANDER'S MARKETS, LUCKY STORES, INC., MARKET BASKET, PURITY STORES, INC., RALPHS GROCERY COMPANY, SAFEWAY STORES, INCORPORATED, THRIFTIMART, INC., THRIFTY DRUG STORES CO., INC., and VON'S GROCERY CO.,

Appellees.

WILLIAM TWYMAN, dba BILL'S UNION STATION, *et al.*,

Appellants and Petitioners for Intervention,

v.

UNITED STATES OF AMERICA; BLUE CHIP STAMP COMPANY; ALEXANDER'S MARKETS; LUCKY STORES, INC.; MARKET BASKET; PURITY STORES, INC.; RALPHS GROCERY COMPANY; SAFEWAY STORES, INCORPORATED; THRIFTIMART, INC.; THRIFTY DRUG STORES CO., INC.; and VON'S GROCERY CO.,

Appellees.

On Appeal from the United States District Court for the Central District of California

Motion of Appellees Blue Chip Stamp Company, Alexander's Markets, Lucky Stores, Inc., Market Basket, Purity Stores, Inc., Ralphs Grocery Company, Safeway Stores, Incorporated, Thriftimart, Inc., Thrifty Drug Stores Co., Inc., and Von's Grocery Co. to Dismiss or Affirm.

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TOPICAL INDEX

	Page
Statement	2
1. Nature of the case	2
2. The proceedings below	4
3. Description of appellants	7
a. Service station operators	7
b. Thrifty Shoppers	8
4. Decision of the District Court	9
5. Restatement of the Questions Presented	9
I The denial of the motions to intervene was proper	11
A. The decree is effective and appropriate	11
1. The decree dissipates the alleged restraints and alleged monopoly in trading stamps	11
2. The District Court insisted that any decree effectively dissipate the alleged monopoly; it considered all proposed alternatives	15
3. The decree also meets the standards of relief of the *Grinnell* case (384 U.S. 563) and the *Du Pont* case (366 U.S. 316)	21
B. Appellants had no right to intervene under Federal Rules of Civil Procedure 24(a) and the District Court properly exercised its discretion in denying intervention under Rule 24(b)	25
1. Appellants had no right to intervene	25
2. Neither the *El Paso* case (386 U.S. 129) nor the *Missouri-Kansas Pipe Line Co.* case (312 U.S. 502) supports appellants' claimed right to intervene	26
Conclusion	28

APPENDIX A Page

Order Denying Motions, United States of America v. Blue Chip Stamp Company, et al., Civil No. 63-1552-F, United States District Court, Central District of California..... 1a

APPENDIX B

Final Judgment, United States of America v. Blue Chip Stamp Company, et. al., Civil No. 63-1552-F United States District Court, Central District of California..... 5a

APPENDIX C

Opinion Denying Motions to Intervene and to Vacate Consent Decree, United States of America v. Blue Chip Stamp Company, et al., Civil No. 63-1552-F, United States District Court, Central District of California..... 19a

APPENDIX D

Reporter's Transcript of Proceedings, United States of America v. Blue Chip Stamp Company, et al., Civil No. 63-1552-F, United States District Court, Central District of California (Thursday, December 15, 1966)..... 39a

TABLE OF AUTHORITIES CITED

Cases	Page
Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137	26, 27
Besser Mfg. Co. v. United States, 343 U.S. 444	23
Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129	26, 27
Continental Ins. Co. v. United States, 259 U.S. 156	27
Sam Fox Publishing Co. v. United States, 366 U.S. 683	26
International Salt Co. v. United States, 332 U.S. 392	23
Maryland and Virginia Milk Producers Assn., v. United States, 362 U.S. 458	24
Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502	26, 27
Thrifty Shoppers Scrip Co. v. Blue Chip Stamp Company, et al., No. 67-596-F (C.D. Cal.)	8
Twyman, et al. v. Blue Chip Stamp Company, et al. Civil No. 66-1522-F (C.D. Cal.)	7
United States v. Aluminum Company of America, 41 F.R.D. 342 (E.D. Mo.), appeal dismissed per curiam sub nom. Lupton Mfg. Co. v. United States, 388 U.S. 457 (Docket No. 1296, October Term 1966)	26
United States v. Du Pont & Co., 366 U.S. 316	21, 22, 23, 27
United States v. Grinnell Corp., 384 U.S. 563	21, 22
United States v. National Linen Service Corp., 1956 CCH Trade Cases ¶68,398 (N.D. Ga.)	22

Page

United States v. United Fruit Co., 1958 CCH Trade Case ¶68,941 (E.D. La.) 22

United States v. Von's Grocery Co., 384 U.S. 270 .. 24

Statutes

Clayton Act Section 7 (15 U.S.C. §18) 22

Robinson-Patman Act (15 U.S.C. §13(a)) 7

Sherman Act (15 U.S.C. §§1 and 2)

Section 1 ..... 2, 3, 7

Section 2 ..... 2, 3, 7, 22

Rules

Federal Rules of Civil Procedure

Rule 6(b) 25

Rule 24(a) 25

Rule 24(a)(1) 25

Rule 24(b) 25

Rule 59(e) 25

Rules of the United States Supreme Court

Rule 16(1)(a) 1

Rule 16(1)(c) 1

Rule 16(1)(d) 1

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Pursuant to Rule 16(1)(a), (c) and (d) of the Rules of this Court, appellees (other than appellee United States, which is filing a separate motion) respectfully move that: (1) the appeals from the Order of the District Court denying Appellants' Motions to Intervene and to Vacate the Final Consent Judgment be dismissed, or alternatively, said Order be affirmed and (2) the pur-

ported appeals from the Judgment of the District Court entered June 5, 1967, be dismissed.

Appellees are authorized to advise the Court that the State of California, California Grocers Association and Certified Grocers of California, Ltd. approve and support this Motion.

STATEMENT

1. Nature of the Case.

These are appeals from an Order of the District Court of the United States for the Central District of California in a government civil antitrust case charging violations of Sections 1 and 2 of the Sherman Act. That Order of August 3, 1967, (App. A) denied the respective motions of appellants to intervene and to vacate the final judgment of the District Court entered on June 5, 1967, upon consent of all parties to the case. Appellants were heard fully as *amici curiae* prior to entry of the consent judgment (App. B) and filed their motions to intervene after the judgment was entered. These are also purported direct appeals by appellants from the final judgment, although none of the appellants was a party to the action.

The government antitrust action began in 1963 with the filing of a complaint against Blue Chip Stamp Company ("Blue Chip") and nine of its stockholders ("retailer defendants").* Blue Chip furnishes a non-franchise

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* Eight retail grocery chains: Alexander's Markets, Lucky Stores, Inc., Market Basket, Purity Stores, Inc., Ralphs Grocery Company, Safeway Stores, Incorporated, Thriftimart, Inc. and Von's Grocery Co.; and one retail drug chain: Thrifty Drug Stores Co. Inc. Contrary to the statement in the Complaint (R. 2, 11) and in one jurisdictional statement (J.S. No. 849, 5), Thrifty Drug Stores Co. Inc., while a present stockholder, was not an original incorporator of Blue Chip.

trading stamp service to thousands of retail merchants in California. The complaint alleged that the defendants had combined and conspired to restrain trade in and to monopolize the trading stamp business in California and that, through a series of allegedly illegal acts, Blue Chip had acquired a monopoly position, in violation of Sections 1 and 2 of the Sherman Act.

In early 1965, the parties began negotiations looking to a possible consent decree. Throughout the negotiations and court proceedings below, the Government insisted that Blue Chip's market position should be curtailed and additional trading stamp competition be generated. (Tr. Dec. 13, 1966, 52-53.) The negotiations were addressed to the way in which this might be accomplished, if possible, without unnecessary injury to the numerous retailers who had turned to Blue Chip as the only trading stamp company which offered its service to all merchants. (R. 2067-69.)

The State of California, speaking on behalf of merchants and in the public interest, participated in the negotiations and in the proceedings below. The State pointed out that a merchant's ability to offer a trading stamp competitive with that used by major retailers was essential to his survival. (R. 1558-1560, 1567, 1570-71, 1578-1588.) It noted that every trading stamp company except Blue Chip dealt on a franchise basis, furnishing its service to a select merchant and not to any of the merchant's competitors. (R. 2073-74, 2091-92, 2140-2182) Because the number of reliable franchise companies was limited, the State feared that smaller as well as many of the larger merchants would be left

without a competitive trading stamp if a viable non-franchise trading stamp company were not preserved. (R. 1578-1593) In the course of the negotiation, the Government also elicited the views of numerous other persons including trading stamp companies and retail merchants. (R. 1822, 1829; Tr. Dec. 13, 1966, 72-73)

After two and one half years of continuous negotiation, all parties, with the approval of California and others, reached agreement on the consent judgment (App. B) entered below. The judgment requires Blue Chip to reorganize, and to present a plan for divestiture of one-third of its trading stamp business. Blue Chip is compelled to continue to offer a non-exclusive service and its operations are placed under other injunctive limitations. The judgment also strips the retailer defendants of control over Blue Chip and places them under stringent prohibitions tailored to the specific acts alleged in the Complaint.

2. The Proceedings Below

The Government's complaint was filed in December 1963. After issue was joined, the Government and defendants engaged in extensive discovery and, commencing in 1965, intensive negotiations concerning a possible consent decree. On July 22, 1966, a proposed decree was lodged with the consent of all parties other than defendants Market Basket and Thriftimart, Inc:, who objected to the decree. The State of California, Certified Grocers of California, Ltd.* and California Grocers

* Certified Grocers of California, Ltd. ("Certified") is a co-operative wholesale grocery concern, consisting of over 2,000 retail grocer members, with approximately 3,000 stores. (R. 1494-95).

Association* (all non-parties) also objected to the decree, and the Government withdrew its consent. (Tr. Oct. 3, 1966, 4.)

Thereafter, California, Certified and CGA, as well as others, were given opportunity to express their views during further negotiations (R. 2067-69), and a second proposed consent decree was lodged on October 28, 1966. Again Market Basket and Thriftimart, Inc. objected to the decree, as did California, Certified, CGA, the Sperry and Hutchinson Company ("S & H")** and the appellant service station operators. Each of these non-parties sought and obtained leave to appear *amicus* and filed briefs in opposition to the decree.

The lodging of the second proposed decree received extensive publicity over radio, television and the press, and on December 13, 14 and 15, 1966, the District Court held a hearing on the decree, allowing all interested persons — whether a party or not — to be heard. All of the *amici* appeared and argued extensively. At the conclusion of the hearing, Judge Ferguson refused to sign the decree and outlined certain suggestions to assist all concerned in future negotiations. In the negotiations

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* California Grocers Association ("CGA") is a statewide retail grocer trade association consisting of approximately 5,000 members, with 6,300 stores; (Tr. Dec. 14, 1966, 300-301).

** Sperry and Hutchinson Company, the largest trading stamp company in the country, is the proprietor of S & H Green Stamps (R. 2150-52). Until Blue Chip appeared as a substantial competitor, this company had dominated the California trading stamp market (R. 2091-94), although the great mass of California retailers were denied its stamp service because of its franchise system (R. 2093-94).

which followed all interested persons were again given full opportunity to participate.

On April 28, 1967, a third proposed decree was lodged. This decree was the first to which all defendants consented. The lodging of the decree again received extensive publicity and actual notice was given to all interested persons, including all prior *amici curiae*. The District Court established a schedule for submission of briefs and set argument for June 5, 1967.

The State of California actively supported entry of the decree, as did Certified and CGA. Three franchise trading stamp companies* appeared in opposition: S & H, Premium Service,** and the appellant in No. 820, Thrifty Shoppers. The appellant service station operators also opposed entry of the decree. Each of the objectors fully availed itself of the opportunity to submit briefs and to argue (R. 2486, 2500, 2504, 2522; Tr. June 5, 1967, 27-85). After oral argument, the court decided to enter the proposed decree. The judgment was entered on June 5, 1967.

On June 15, 1967, the appellant service station operators filed their motions to intervene and to vacate the judgment. The motions were accompanied by a complaint in intervention and a demand for jury trial on all issues in the government proceeding. On July 12, 1967, appellant Thrifty Shoppers filed similar motions. Briefs were submitted and oral argument was heard on July

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* A fourth trading stamp company (King Korn) filed a letter opposing entry of the decree (R. 2532).

** Premium Service, a national trading stamp company, is the proprietor of Gold Bond Stamps.

31, 1967. At the conclusion of the argument the court denied the motions and a minute order was so entered.* The written order was entered on August 3, 1967, and a written opinion (App. C) was filed on August 18, 1967.

3. **Description of Appellants.**

a. **Service Station Operators**

Appellants "independent California service station operators" are present or former gasoline station operators who are plaintiffs in a private treble damage action against Blue Chip.** The action, now pending in the court below, seeks damages because of alleged violations of Sections 1 and 2 of the Sherman Act and because of alleged price discriminations under the Robinson-Patman Act. These appellants filed their damage action in February 1966 and first expressed interest in this proceeding in response to the lodging of the second proposed consent decree. Appellants appeared *amicus* and objected to entry of that decree because it allegedly would have impaired Blue Chip's ability to pay damages if appellants were able to prevail in their private litigation.***

These appellants also appeared *amicus* and objected to entry of the final judgment on June 5, 1967. At oral

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* A third person, Raley's, Inc., a nondefendant Blue Chip stockholder, also filed a motion to intervene and to vacate the judgment, which motion was denied, but Raley's has abandoned its appeal.

** *Twyman, et. al. v. Blue Chip Stamp Company, et al.*, Civil No. 66-1522-F (C.D. Cal.)

*** "[T]he plaintiff service station operators would be left in the position of suing the hollow shell of a corporation . . . which will be left as the Blue Chip successor." (R. 2365, 2369)

argument, the Court urged their counsel to describe any way in which the decree could be improved and addressed the same question to the State of California. (Tr. June 5, 1967, 52-53, 86) Appellants offered no help to the Court and the State advised that it could see no way in which the decree would hurt the gasoline station operators. (Tr. June 5, 1967, 52-67, 86-87)

b. **Thrifty Shoppers.**

Thrifty Shoppers is a trading stamp company operating in Northern California (Tr. June 5, 1967, 49) and primarily in the San Francisco area. Unlike Blue Chip, it grants franchises to selected merchants and denies its stamp service to competitors of its licensees (Tr. July 31, 1967, 29; June 5, 1967, 44).

Thrifty Shoppers began operations prior to World War II. (Tr. June 5, 1967, 50) Blue Chip began its operations in Northern California in 1956. (R. 11; 2092) Eleven years later, more than three years after the Government action was filed, and more than two years after it had become widely known that consent decree negotiations were in progress, Thrifty Shoppers filed a private treble damage action against Blue Chip and the retailer defendants* and, shortly thereafter it sought leave to appear *amicus* in the consent decree proceedings. Counsel for Thrifty Shoppers was invited by the Court to suggest a

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* *Thrifty Shoppers Scrip Co. v. Blue Chip Stamp Co., et al.*, No. 67-596-F (C.D. Cal.). Thrifty Shoppers claims that Blue Chip caused it to lose business but that, of course, is yet to be established. It does not allege that it ever offered its trading stamp service to any defendant or any other major retailer.

more effective decree, but offered nothing constructive as an alternative (Tr. July 31, 1967, 29-34).

4. Decision of the District Court.

In his opinion (App. C) Judge Ferguson held that the motions to intervene and to vacate the judgment should be denied because (1) appellants had failed to make any showing at all as to any right which could be protected only by intervention, (2) the motions were not "timely" (3) appellants had not demonstrated the existence of any "interest relating to the property or transaction" sufficient to support their respective motions to intervene, (4) in any event appellants' motions were without merit, and (5) to grant such motions would unduly delay and prejudice the rights of the parties. These appeals followed.

5. Restatement of the Questions Presented.

Although appellants purport to set forth "significant" Questions Presented (J.S. No. 820, 2-3; No. 849, 3-4), their questions are neither accurate nor fair. These appeals present two limited questions:

1. After unanimous settlement of a protracted and complex Government antitrust action, do strangers to that action, who presented their views fully to the District Court, have the right to intervene after judgment, where their interests, if any, are being litigated in their own private treble damage actions against the defendants?

2. Where a final consent Judgment which was entered prior to the taking of any evidence:

(a) Provides for the breakup of an alleged monopoly position in California of a non-franchise trading stamp company by divestiture of one-third of its business to a new non-franchise trading stamp company and by the establishment of additional competitive opportunity for other trading stamp companies;

(b) Decrees the reorganization of the company by removing the nine retailer-stockholder-defendants from control thereof and provides for ownership by others of more than 55% of the stock; and

(c) Enjoins every practice which the complaint alleged to be illegal;

did the District Court abuse its discretion in entering that consent Judgment?

I.

THE DENIAL OF THE MOTIONS TO INTERVENE WAS PROPER.

A. The Decree Is Effective And Appropriate.

1. The Decree Dissipates The Alleged Restraints And Alleged Monopoly In Trading Stamps.

The decree (App. B, 5a-18a) specifically enjoins all the alleged illegal practices of the retailer defendant stockholders by forbidding them from:

> (a) Combining or conspiring to restrain trade or to monopolize or attempt to monopolize the trading stamp business in California (App. B, 7a);
>
> (b) Agreeing not to use or use stamps in a particular area, or not to use or use a particular stamp (App. B, 8a);
>
> (c) Agreeing to limit the rate of issue employed in distributing trading stamps to their respective customers (App. B, 8a); and
>
> (d) Acting jointly with any other user of trading stamp services in the same line of business to organize or acquire a trading stamp company (App. B, 8a).

The decree specifically enjoins all of the alleged illegal practices of defendant Blue Chip by forbidding it from:

> (a) Refusing to provide stamps or imposing any limitation on such stamp use because of (i) the presence in the same locality of any other establishment using Blue Chip stamps, (ii) the rate of issue employed by such person in offering Blue Chip or any other stamp, or (iii) the use by such person of any other trading stamp service (App. B, 13a-14a);

(b) Coercing or compelling any person (i) to limit the rate of issue of Blue Chip stamps or any other stamp, or (ii) to refrain from using any other trading stamp service (App. B, 13a-14a).

Having enjoined all of the alleged illegal practices of both the retailer defendants and Blue Chip, the decree then provides that "bona fide and diligent efforts" (App. B, 9a) be made to dissipate the alleged monopoly in non-franchise trading stamps by a reorganization* of Blue Chip (App. B, 8a-9a) and submission of a plan to be approved by the Court for a divestiture of one-third of Blue Chip's business (App. B, 15a-17a).

Under the reorganization plan (R. 3321, 3325) the present shareholders of Blue Chip, both defendant and non-defendant, will divest themselves of over 55% of the stock of Blue Chip, and after divestiture no individual retailer will have more than 4½% of Blue Chip stock (R. 3321, 3324, 3326; Tr. June 5, 1967, 10). In addition to the above-mentioned horizontal provisions of the decree which prevent any concerted action by the defendant retailers, no defendant for ten years can vote its stock (App. B, 15a) nor have an officer, director or employee who also serves as an officer, director or employee of Blue Chip (App. B, 15a). The plan of reorganization as approved by Judge Ferguson permits establishment of an orderly market for stock of the

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* There is also a provision (App. B, 9a) for certain Governmental action if such reorganization is not "bona fide and diligent", but there is no claim by appellants that the reorganization is not proceeding as rapidly as possible, subject to final disposition of the instant appeals from the denial of the motions to intervene and to set aside the consent decree.

reorganized company. The stock must be fully alienable, and an active market in the stock should result because the stock will be offered initially at a bargain price (R. 3220-21; 3328) and no stockholder need be a user of Blue Chip stamps and no user need be a stockholder (R. 3333).

The Government strongly asserted its view that these provisions effectively divest control of Blue Chip by the retailer defendants:

> "[By Mr. Spivack] So from the position where the defendants have, we allege, acted in concert, where they have dominated Blue Chip from the beginning, where they had 90 per cent of Blue Chip stock, the defendants will be placed in a position where they can't act in concert because no one of them has more than 4½ per cent of the stock, and none of them have any voting rights, and none of them can participate in the operation of Blue Chip.
>
> "So I think that effectively deprives the defendants of control of Blue Chip. And all the arguments to the contrary just ignore the provisions of the decree that prevent a concerted action, that prohibit voting, that prohibit participation in Blue Chip, and prohibits them acting in concert." (Tr. June 5, 1967, 10.)

After the reorganization occurs, Blue Chip must present a plan for divestiture of one third of its business. (App. B, 15a) The divested portion of the business will be in a contiguous area in Southern California. (App. B, 16a) The purchaser must be acceptable to the Government and the Court, and must offer a non-franchise trad-

ing stamp service. (App. B, 16a-17a) Blue Chip is enjoined from offering any service at all in the contiguous area for at least one year and is required to compete in that area thereafter. (App. B, 16a-17a)

With divestiture, there will be two non-franchise stamp companies. Blue Chip will then be placed under a severe competitive handicap because of the territorial limitation on its business. The new company, and, indeed, every other trading stamp company will be able to offer a stamp service in *all* of Southern California and *all* of the state while Blue Chip will be unable to do so. All of these companies, including the new company, will thus have every incentive and opportunity to compete for Blue Chip's patrons.

The Government was convinced of the effectiveness of this divestiture provision in dissipating the effect of the alleged monopoly and specifically stated to the district court that the first prospective purchaser for the business to be divested had already sought preliminary Government approval.*

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* "[BY MR. SPIVACK] Third, the decree dissipates Blue Chip's monopoly position. The decree provides that in 30 months — or within 30 months — after Blue Chip is reorganized, new Blue Chip will come up with a plan to divest itself of one-third of its statewide business; all of that business is to be located in Southern California; is to be divested to a purchaser who will agree to abide by the terms of the decree; will be acceptable to the Government or this court, will have to agree to conduct a non-franchise stamp business in Southern California for a reasonable period of time.

"THE COURT: Let me ask you this question: Is that provision economically realistic?

"MR. SPIVACK: Yes, I think so.

2. The District Court Insisted That Any Decree Effectively Dissipate The Alleged Monopoly; It Considered All Proposed Alternatives.

At all times, the District Court made it abundantly clear that it was determined to break up the alleged monopoly position of Blue Chip. At the conclusion of the hearing concerning the second decree, the court stated that it would not sign the decree because it would not create competition in the trading stamp business; because it was "unjust and not operable", and because the viability of the new non-franchise stamp company proposed

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"THE COURT: What studies has the Department made?

"MR. SPIVACK: None.

"THE COURT: For you to make that statement?

"MR. SPIVACK: None. That is based on my knowledge of the business gained from this case and prior cases. It is our judgment that it is realistic.

"And I can add another thing, I have got a buyer for that that wants to buy it right now — Gold Bond wants to buy it right now.

"I told them they couldn't buy it. So I assume if they are willing to buy it today, they will be willing to buy it 30 months from now.

"If they are willing to buy it, probably somebody else will be willing to buy it.

"THE COURT: What is your present objection to Gold Bond?

"MR. SPIVACK: We presently consider Gold Bond one of the top five trading stamp businesses in the United States, a substantial competitor in this market.

"We think that before they would be allowed to buy that kind of a share of market, the Southern California business, that they demonstrate they can't come in here through internal growth, and I want to see what happens in the next three years.

to be created pursuant to the decree* appeared doubtful (Tr. Dec. 15, 1966, 403-5). District Judge Ferguson then set forth two essential requirements for *any* decree that he would approve, whether before or after trial:

> "The problem then requires two things. One, to establish a viable new company, a viable stamp business in California which will compete with S & H, and also at the same time eliminate the monopoly which Blue Chip presently has today." (Tr. Dec. 15, 1966, 404)

Judge Ferguson's primary concern to dissipate the alleged monopoly and create additional competition in

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"I told them that if they came in, made a bona fide effort and tried to break into this market and they couldn't do it, then they would be an acceptable purchaser 30 months from now. But I want to see what happens.

"Now, once this decree does go into effect, your Honor, since Blue Chip does urge its signing, Blue Chip will, in fact, be splitting itself in half in Southern California. You are going to have three strong competitors in Southern California, S & H, New Blue Chip and the purchaser of one-half of Blue Chip's Southern California business.

"THE COURT: To go back to Gold Bond again, did they indicate that they would go on a non-franchise basis?

"MR. SPIVACK: I told them what the terms of the decree were and they said they would be willing to buy [sic] bound by those terms, the terms of the decree. And that decree provides for a non-franchise basis.

"So you are going to have three strong competitors in Southern California, S & H, New Blue Chip and the buyer of one-third of New Blue Chip — or one-half of the Southern California business. (Tr. June 5, 1967, 11-13.)

* The entire statement of reasons by the Court at the hearing is set forth in App. D hereto.

the trading stamp business is reflected again and again in the hearing on the motions to intervene on July 31, 1967. In an exchange with counsel for the service station operators, District Judge Ferguson stated:

> "Now I want to eradicate any conception in your mind that I am trying to protect the Blue Chip Stamp Company, because, sir, I can tell you I am not.
>
> "I want to do all I can to bring in competition in the non-franchise stamp business in California.
>
> "There is nothing you have told me, nothing that I have read, nothing that I have gleaned, any single scintilla of evidence or hint in the extensive memoranda which have been filed which indicates to me that anything else can be done except what I have done." (Tr. July 31, 1967, 39-40)

A subsequent exchange with the same counsel also expressed the Court's willingness to consider any alternative proposal which might establish greater competition:

> "THE COURT: You want to intervene — and I have to admire Mr. Gold [counsel for appellant Thrifty Shoppers] for his honesty — you want to intervene to take advantage of the Government's lawsuit for your own private interest. And I guess maybe there is nothing wrong in that.
>
> "MR. DOWNS: Rule 24(a) says it is our interest, and that is the reason we want to intervene.
>
> "THE COURT: Because you want to win your private lawsuit.

"MR. DOWNS: Well, more than that, we want to see competition of four or five competitors of this state which will really give us the choice —

"THE COURT: Well, you are going to have to demonstrate to me that this decree will not accomplish that. And you haven't presented one scintilla of evidence to me that anything else that you propose is better than the present decree.

"And in the final analysis you want to win your private lawsuit, and I guess that is what lawyers are for. And they should try to win their private lawsuits.

"But I am not going to upset this decree under any circumstances until you have convinced me that the plan you propose is a better plan to bring in competition of the non-franchised stamp business in California.

"MR. DOWNS: Yes.

"THE COURT: And you haven't done it. You haven't even approached it closely." (Tr. July 31, 1967, 41-42)

In exchanges with counsel for appellant Thrifty Shoppers, the same determination was manifest:

"THE COURT: You see, I want to bring in two non-franchised stamp companies. I want a company to come in that is going to be bigger than Blue Chip and maybe drive them to their knees. Frankly, I hope that that is accomplished.

"MR. GOLD: Well, I don't think you —

"THE COURT: If you can tell me another way in which that can be done I take my hat off to you." (Tr. July 31, 1967, 30-31)

Appellants objected to the decree, but at no time did they offer nor do they now offer a plan to replace Blue Chip with an acceptable non-franchised trading stamp of general availability. And yet the careful studies of California, Certified and CGA showed this to be absolutely essential to preservation of competitive conditions in the grocery business in California*. The District Court found the objections to the decrees to be without merit, and the failure to suggest an acceptable alternative was fatal to the motions to intervene:

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* California, Certified and CGA repeatedly asserted that the competitive conditions in the retail grocery business (indeed, survival of many grocers) could only be maintained if the small grocer could obtain a trading stamp which was the same as or comparable to that stamp used by the larger chains (R. 1509-1512, 1520-26; 1558-1560, 1567-1571, 1577-1588). They argued that since a franchise stamp company, such as S & H, does not license grocers in competition with one another (R. 1850-54) and the number of responsible franchise stamp companies is limited (R. 1850-54; 2146), the result of a dissolution of Blue Chip would be that a few larger chains would obtain the franchise stamps and their smaller competitors and other chains would be without a reliable stamp (R. 1850-54).

It was this concern over the effects of the franchise stamps that led to the creation of Blue Chip and the non-franchise concept (R. 1830-32). By providing the Blue Chip stamp to all retailers, the smallest grocer in competition with the largest chain using Blue Chip could offer the same Blue Chip stamp if he so desired (R. 2094-2104). In addition, the smallest grocer in competition with the largest chain using a franchise stamp was assured of the availability of a reliable Blue Chip stamp which was comparable to any fran-

[THE COURT]:

"I personally am convinced, after as detailed a study as any human being can make on this bench, that the decree which is now in full force and effect is that type of decree which will properly, speedily, effectively and economically restore — not restore but bring into the non-franchised stamp business of California effective viable competition.

"And if I didn't think it did, I can assure all the movants here this morning, and everybody else in the courtroom, that I would have never under any circumstances signed that decree.

"And if they could present to me, or if they had presented to me a better plan to restore competition in the revelant market I would think that there would be more validity towards their motions.

"But they haven't. And I think that the decree now in full force and effect is a good and valid decree, and therefore there is no merit whatsover

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chise stamp service (R. 2092-94). The Blue Chip stamp was, according to California Certified and CGA, the salvation of the small grocer in California (R. 2094-2104) and it was the use of Blue Chip by others than the retailer defendants and the failure of any franchise stamp company to go non-franchise that caused over two-thirds of the growth of Blue Chip (R. 2123-24, 2136-37).

The Government during the negotiations also took the position, and the District Court was of the same view, that a non-franchise trading stamp must be available which is comparable to a franchise stamp service and which would maintain effective competition in the grocery and other retail businesses. (Tr. Dec. 15, 1966, 402-404; July 31, 1967, 53.)

to the motions of the moving parties." (Tr. July 31, 1967, 72-73)

Judge Ferguson also asked both the Government and the State of California whether they could conceive of a decree which could "better open up competition in the non-franchised stamp business in California" (Tr. July 31, 1967, 53, 65) and both replied that they could not (July 31, 1967, 53-55; 65-67).

3. The Decree Also Meets The Standards Of Relief Of The Grinnell Case (384 U.S. 563) And The Du Pont Case (366 U.S. 316).

Appellants rely heavily on *United States v. Grinnell Corp.*, 384 U.S. 563, and *United States v. Du Pont & Co.*, 366 U.S. 316; but it should be noted that both of there were litigated cases in which the propriety of relief *after trial* was questioned. In *Du Pont* this Court carefully noted that:

> "Appellees rely on several Clayton Act consent decrees granting relief short of divestiture, but the circumstances surrounding such negotiated agreements are so different that they cannot be persuasively cited in a litigation context." (366 U.S. 316, 330, fn. 12)

But even if viewed as if it were the result of a litigated case, the present decree meets the standards of *Grinnell*. This Court there, contrary to appellants' argument here, did not order "complete divestiture". Rather, the Court stated that to "break up or render impotent" the monopoly power (384 U.S. 563, 577) there involved:

> "That there should be *some divestiture* on the part of ADT seems clear; but the details of such divestiture must be determined by the District Court as the matter cannot be resolved on this record." (384 U.S. 563, 578) [Emphasis added]

As noted above, insofar as the retailer defendants are concerned, control over Blue Chip is effectively eliminated. Insofar as the alleged monopoly position of Blue Chip is concerned, the remedy need not be eradication of Blue Chip*. Relief provisions in Section 2 cases generally require a disposition of part of the business to reduce the market share and thus "break up" the monopoly.** This is exactly what the present decree requires — presentation to the Court of a plan for the sale of one-third of the business of Blue Chip under conditions designed to ensure a substantial and viable non-franchise

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* The *Du Pont* case (366 U.S. 316) relied on so heavily by appellants was, of course, a Clayton Act, Section 7 case involving a divestiture of stock, but even there this Court rejected the Government's argument there that divestiture was "required" whenever a violation of Section 7 was found (366 U.S. 316, 328, fn. 9). Although the *Grinnell* case, 384 U.S. 563, was not a Section 7 case, its monopoly postion had been obtained in large part by a series of mergers or asset acquisitions (384 U.S. 563, 567-568) and the individual companies were not ordered destroyed.

** See, e.g., *United States v. United Fruit Co.*, 1958 CCH Trade Cas. ¶68, 941 (E.D. La.) [creation of new company to import fruit]; *United States v. National Linen Service Corp.*, 1956 CCH Trade Cas. ¶68, 398 (N.D. Ga.) [disposition of certain branches and routes].

trading stamp competitor* and circumstances which provide additional competitive opportunities for other stamp companies.

Finally, even in litigated cases, it is well established that district courts ". . . are invested with large discretion to model their judgments to fit the exigencies of the particular case." *International Salt Co. v. United States,* 332 U.S. 392, 400-401; *Besser Mfg. Co. v. United States,* 343 U.S. 444, 449.

It is true, as noted by appellants, this Court stated in the *Du Pont* case that:

> "Economic hardship can influence choice only as among two or more effective remedies. If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences." (*United States v. Du Pont & Co.,* 366 U.S. 316, 327)

However, the second proposed decree was rejected precisely because the Court was satisfied that it would *not* be effective, or workable, or establish additional competition in the trading stamp business (Tr. Dec. 15, 1966, 403, 406).

The problem of framing an effective decree here was a complex one because of the direct effect of trading stamps upon retail competition and particularly competition in the grocery industry. It was effectively demon-

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* The court viewed this as the "very fundamental keystone, the cornerstone to this decree." (Tr. July 31, 1967, 17).

strated by the California Attorney General (R. 2112-2135, 2140-2173), among others, that to grant different relief than the present consent decree appealed from would not only fail to dissipate the alleged monopoly but would likely bring about the results this Court sought to prevent in *United States v. Von's Grocery Co.*, 384 U.S. 270: an increase in concentration and a decrease in competition in the California grocery industry.

This is a consent decree finally hammered out after protracted negotiations. The District Court was unquestionably dedicated to opening the trading stamp market and specifically sought and obtained agreement that it retained full jurisdiction under certain discretionary provisions of the decree in order to achieve that end (Tr. June 5, 1967, 74-75; July 31, 1967, 61-63). Under such circumstances, the following statement of this Court is uniquely *apropos*:

> "The formulation of decrees is largely left to the discretion of the trial court, and we see no reason to reject the judgment of the District Court that the relief it granted will be effective in undoing the violation it found in view of the fact that it also retains the cause for future orders, including the right of visitation if deemed appropriate."
>
> *Maryland and Virginia Milk Producers Assn. v. United States*, 362 U.S. 458, 473.

B. Appellants Had No Right To Intervene Under Federal Rules Of Civil Procedure 24(a) And The District Court Properly Exercised Its Discretion In Denying Intervention Under Rule 24(b).

1. Appellants Had No Right To Intervene.

Intervention as of right in the federal District Court is governed by Rule 24(a) of the FRCP which provides in part that a proposed intervenor must make "timely application"* and also establish that he

> " . . . claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. . . ."**

Appellants have made no showing of an "interest relating to the property or transaction" which was the subject of the Government's action, or which is not protected by the consent decree. Appellants have filed treble damage actions now pending in the District Court, charging the defendants with substantially the same violations

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* The reasons why the motions were not timely are fully set forth in the court's opinion (App. C 25a-31a) and will not be repeated here. However, we note that with respect to Thrifty Shoppers, the motion to vacate under Federal Rule of Civil Procedure 59(e) was not filed until July 12, 1967, and more than 10 days after the entry of judgment on June 5, 1967. FRPC 6(b) specifically provides that this 10-day time limit under FRCP 59(e) cannot be extended, and the motion to vacate the judgment by Thrifty Shoppers was therefore not timely.

** Appellants do not claim any right to intervene under Rule 24(a)(1) which authorizes intervention "when a statute of the United States confers an unconditional right to intervene. . . ."

as charged in the Government complaint and this "interest" is in no way "impaired or impeded" by the consent decree since their purported "interest" can be satisfied by a money judgment or, upon a proper showing in their own actions, by some other form of relief for any injury they may prove.

2. Neither The El Paso Case (386 U.S. 129) Nor The Missouri-Kansas Pipe Line Co. Case (312 U.S. 502) Supports Appellants' Claimed Right To Intervene.

We respectfully suggest that the carefully reasoned opinion of District Judge Ferguson (App. C, 29a-31a), sufficiently distinguishes the *El Paso* case. There is no need for us to belabor the point here. That the *El Paso* case has not swept away the long-standing policy against permitting intervention in Government antitrust suits was demonstrated in the last term by this Court's summary dismissal of an appeal from denial of a motion to intervene in *United States v. Aluminum Company of America*, 41 F.R.D. 342 (E.D. Mo.), appeal dismissed *per curiam sub nom. Lupton Mfg. Co. v. United States*, 388 U.S. 457 (Docket No. 1296, October Term 1966). Accord: *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689; *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 140-42.

Granting intervention here would not serve the purpose of giving appellants "an opportunity to be heard" as in *El Paso* (386 U.S. 129, 136), since appellants have already had every opportunity, and fully exercised it, to be heard as *amici curiae*. Nor would it serve the purpose, as in *El Paso*, of providing a means for this Court to

assure that its mandate, issued after a litigated judgment, is carried out.* (386 U.S. 129, 136)

As for appellants' reliance on *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, the earlier decree there had specifically reserved to petitioner the right later to intervene and this Court carefully noted that its decision to permit intervention was based solely upon that specific decree provision and not upon general principles governing intervention (312 U.S. 502, 506).

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* This Court, of course, has "plenary power" to determine whether its earlier mandate "was scrupulously and fully carried out." *United States v. Du Pont & Co.*, 366 U.S. 316, 325. In *Continental Ins. Co. v. United States*, 259 U.S. 156, 166, this Court stated:

> "We delegated to the District Court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal, and that gives us plenary power where the compliance has been attempted and the decree in any proper way is brought to our attention to see that it follows our opinion."

CONCLUSION

We respectfully submit that appellant's motions were not timely and that they were not meritorious. They do not raise any issues not fully argued by appellants as *amici curiae* and rejected by District Judge Ferguson after careful consideration. We urge that the carefully reasoned opinion of Judge Ferguson (App. C) is clearly correct and that the decree should be carried out.

The motion to dismiss or affirm should be granted so that "bona fide and diligent" efforts to carry out the relief provided by the decree may be consummated without further delay.

DATED: January 2, 1968.

Respectfully submitted,

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